

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA

v.

DENNIS OWEN COLLINS, et al.,

Defendants.

Criminal No. 1:13-cr-383

Hon. Liam O'Grady

Trial Date: October 7, 2014

**MOTION *IN LIMINE* FOR A RULING PERMITTING THE
GOVERNMENT TO USE FEDERAL RULE OF EVIDENCE 902(11) FOR THE
AUTHENTICATION OF DOMESTIC RECORDS OF
REGULARLY CONDUCTED ACTIVITY**

COMES NOW the United States of America by and through its undersigned counsel and moves this Honorable Court for a ruling in advance of trial to permit the government to use Federal Rule of Evidence 902(11) to authenticate business records otherwise admissible pursuant to Federal Rule of Evidence 803(6). In support of such motion, the government submits:

1. At trial the government intends to offer into evidence the following:

a. GX30 consists of business records from Buckeye CableSystem.

The records relate to the IP address 72.241.173.63. A copy of the declaration of authenticity and accompanying records are attached as Exhibit 1.

b. GX31 consists of business records from Yahoo!. The records relate to the username "jeremyhfht1" to include login IP addresses including IP address 68.55.121.177 and the email account grishnav@yahoo.com to include login

IP addresses including IP address 71.197.246.227. A copy of the declaration of authenticity and accompanying records are attached as Exhibit 2.

c. GX32 consists of business records from AOL Inc. The records relate to the IP address 71.197.246.227 in 2010. A copy of the declaration of authenticity and accompanying records are attached as Exhibit 3.

d. GX33 consists of business records from Comcast. The records relate to the IP address 68.55.121.177. A copy of the declaration of authenticity and accompanying records are attached as Exhibit 4.

e. GX34 consists of business records from Google. The records relate to the email account jeremyhfht@gmail.com and the IP address 68.55.121.177. A copy of the declaration of authenticity and accompanying records are attached as Exhibit 5.

f. GX35 consists of business records from Georgia Institute of Technology. The records relate to the IP address 128.61.78.41. A copy of the declaration of authenticity and accompanying records are attached as Exhibit 6.

g. GX36 consists of business records from MySpace.com. The records relate to user account #145201427 with associated email jeremyhfht@gmail.com and user account #7136101 with associated email grishnav@egosurf.net. A copy of the declaration of authenticity and accompanying records are attached as Exhibit 7.

h. GX37 consists of business records from Google. The records relate to email accounts anontana@gmail.com and anonopsspark@gmail.com and

the IP address 72.174.53.227. A copy of the declaration of authenticity and accompanying records are attached as Exhibit 8.

i. GX38 consists of business records from Verizon. The records relate to the IP address 96.248.94.3. A copy of the declaration of authenticity and accompanying records are attached as Exhibit 9.

j. GX39 consists of business records from Comcast. The records relate to the IP address 71.197.246.227. A copy of the declaration of authenticity and accompanying records are attached as Exhibit 10.

k. GX40 consists of business records from Secured Servers, LLC. The records relate to the IP address 71.197.246.227. A copy of the declaration of authenticity and accompanying records are attached as Exhibit 11.

2. The custodians of records for the documents described above are largely located outside of Virginia.

3. The government is not aware of any bases that would constitute a legitimate challenge to the admissibility of any of the above records.

4. Federal Rule of Evidence 902(11) permits authentication of such records by a written declaration of its custodian or other qualified person. Thus, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(11) Certified Domestic Records of Regularly Conducted Activity. – The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any . . . rule prescribed by the Supreme Court pursuant to statutory authority. . .

The Advisory Committee Notes addressing the 2000 Amendments to the Federal Rules of Evidence make clear that “[a] declaration that satisfies 28 U.S.C. §1746 would satisfy the declaration requirement of Rule 902(11), as would any comparable certification under oath.”

5. A written declaration attesting to the authenticity of a business record is not testimonial in nature. The Supreme Court specifically observed that business records “by their nature are not testimonial.” *Crawford v. Washington*, 584 U.S. 36, 56 (2004). In *United States v. Ellis*, 460 F.3d 920, 927 (7th Cir. 2006), the court concluded that business records could be properly introduced pursuant to Federal Rules of Evidence 803(6) and 902(11). *See also United States v. Hagege*, 437 F.3d 943, 957-958 (9th Cir. 2006) (holding that “foreign business records admitted under § 3505 are not subject to the *Crawford* requirement of confrontation”); *United States v. Jamieson*, 427 F.3d 394, 411-412 (6th Cir. 2005) (holding that business records admitted under Rule 807 did not resemble the “formal statement” or “solemn declaration” identified by the Supreme Court in *Crawford*); *United States v. Lopez-Moreno*, 420 F.3d 420, 436-437 (5th Cir. 2005) (holding that public records are not testimonial and recognizing that, under *Crawford*, business records, which are analogous to public records, are not testimonial and are not subject to the requirements of the Confrontation Clause). The Court of Appeals for the District of Columbia followed *Ellis*’ reasoning in *United States v. Adefehinti*, 510 F.3d 319, 325-328 (D.C. Cir. 2008) (reversing conviction on other grounds). Moreover, the court there held that it is not necessary for the certifying records custodian to have

personal knowledge of the creation of the records maintained by the business. *Id.* at 325.

6. Accordingly, the United States asks for a ruling by this Court in advance of trial allowing authentication of the above described business records by declarations complying with Federal Rule of Evidence 902(11) and 28 U.S.C. § 1746, copies of which have been made available to the defense and are attached to this Motion.

Respectfully submitted,

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Date: September 26, 2014

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2014, I electronically filed the foregoing MOTION IN LIMINE FOR A RULING PERMITTING THE GOVERNMENT TO USE FEDERAL RULE OF EVIDENCE 902(11) FOR THE AUTHENTICATION OF DOMESTIC RECORDS OF REGULARLY CONDUCTED ACTIVITY with the Clerk of Court using the CM/ECF system, which will send a notification of that electronic filing (NEF) to the following:

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